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Office of the Assistant Attorney General

Washington, D.C. 20530

24 MAY 1984

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

You have asked for this Department's views on separate letters from the Department of State, the Central Intelligence Agency (CIA), and the Office of Personnel Management (OPM), commenting on the proposed bill prohibiting the payment of annuities to federal employees convicted of certain crimes. The bill was originally drafted by OPM, but substantial changes in this initial version were recommended by the Department of Justice in a December 12, 1983 memorandum transmitted to OPM. The letters from the Department of State and the CIA comment on our December 12, 1983 proposal. In response to all of these submissions, the letter from OPM, dated May 4, 1984, offers a new draft of the bill, which adopts many of this Department's changes, but, unlike our proposal, limits the bill's coverage to civil service retirement annuities and military retired pay, thereby explicitly excluding the CIA and State Department retirement systems.

For reasons described in detail below, we believe our December 12, 1983 proposal, with certain modifications, should be adopted. Contrary to OPM, we feel that non-civil service retirement annuities, such as those of the CIA and State Department, should be covered by the disqualifying penalties of these amendments. We also believe, contrary to the CIA, that OPM should administer the application of these disabilities to employees of all civilian retirement systems covered by the bill, although we may be willing to reconsider this latter conclusion where an agency with its own pension system can provide compelling reasons favoring its independent administration of these penalties.

I. Background

This Department's December 12, 1983 proposal, which adds several new subsections to 5 U.S.C. § 8312, would grant OPM authority to deny payment of an "annuity" to any individual

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or his survivor or beneficiary if OPM makes three findings. First, the individual must have been convicted of one of certain crimes committed in connection with his employment. Second, the crime must have been listed before its commission in regulations promulgated by the Attorney General. Finally, OPM must find "the circumstances regarding the commission of the offense and the seriousness of the crime are such that the interests of justice require denial of the annuity." The bill would also establish a parallel system giving the Department of Defense similar authority with respect to military "retired pay" subject to its administration.

In its letter, the State Department appears to support our amendment of 5 U.S.C. § 8312, but indicates that our draft might not apply to the Foreign Service Retirement and Disability System. Accordingly, the State Department seeks an opinion whether an Executive order extending the provisions of the draft bill, once enacted, to this separate retirement system would be a sufficient basis for the denial of an annuity to a Foreign Service participant. The CIA, on the other hand, expresses the view that the draft bill would apply to the CIA Retirement and Disability System (CIARDS), but that the exercise by OPM of discretionary authority over CIARDS would be an unwelcome intrusion into this separate retirement system. Thus, the CIA recommends that the draft bill be amended to exclude CIARDS from the reach of OPM's authority. After the bill is enacted, the CIA suggests, the restrictions in the Act could be extended to CIARDS by Executive order. 1/

1/ The CIA also recommends that the national security-related provisions of 5 U.S.C. § 8312 be updated by adding the Intelligence Identities Protection Act, 50 U.S.C. §§ 421-26, to the list of pension disqualifying crimes. We have no objection to including these offenses within the purview of 5 U.S.C. § 8312, but do not believe there is any need for a specific amendment of the statute in this regard. The offenses in 50 U.S.C. §§ 421-26 could appropriately be included in regulations which would be promulgated by the Attorney General under our draft bill and which would list offenses the conviction of which could result in pension denial. Specifically, 50 U.S.C. §§ 421-26 would fall within the category of offenses described in proposed subsection (f)(1), which our draft bill would add to 5 U.S.C. § 8312 -- i.e., any offense which involves "intentional misuse of federal public office punishable by imprisonment for a term of 3 or more years." Including 50 U.S.C. §§ 421-26 in the regulations is preferable to specifically including these sections in the mandatory pension denial provisions of 5 U.S.C. § 8312 since the former route would assure that a pension is denied for conviction of these title 50 violations only if they are job-connected and only where the circumstances dictate that pension denial is an appropriate penalty.

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In its May 4 letter, OPM has generally accepted the changes contained in our December 12, 1983 redraft, but proposes, among other things, that the bill cover only civil service retirement annuities and military retired pay. Thus, CIA and Department of State employees would not be subject to the bill's penalties under OPM's latest version.

II. Analysis

These letters raise four separate questions with respect to the coverage and administration of the proposed statutory penalties. As a preliminary matter, the first issue presented is whether, in addition to covering military retired pay, the disqualifying penalties imposed by the proposed amendment should apply generally to all federal government annuities, or only to civil service annuities. Assuming the penalties are generally made applicable to all government annuities, the second question we must address is whether this coverage should be accomplished with respect to non-civil service pension systems, such as the CIA and State Department, by issuance of an Executive order or by statutory amendment. The third issue, discussed by the CIA, is whether denial of annuities to individual employees should be made by each retirement system separately, or should OPM be vested with this responsibilities for all covered civilian retirement annuities. The final and most narrow question, raised indirectly by OPM's proposed redraft of the bill, is whether employees should be subject to denial of their military pensions if they commit a covered felony in the course of federal civilian employment. As discussed below, we conclude our December 12, 1983 draft offers the most appropriate resolution to all of these issues.

(A) Coverage

With respect to the initial question of coverage, we believe all government "annuities," as defined in § 8311, including the CIA and the Department of State retirement systems, should be within the scope of this amendment. In our view, there is no justification for imposing statutory pension denial on civil service employees and military personnel, but not on Foreign Service and CIA personnel subject to separate retirement systems. The current penalties in § 8312 already cover these systems, denying the receipt of any "annuity" or "retired pay" to individuals convicted of certain statutorily enumerated crimes. As defined in § 8311, the term "annuity" generally covers, with perhaps only a few exceptions, all government retirement systems, including the Department of State and the CIA. Thus, in adopting the same coverage as

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the other subsections of § 8312, this Department's proposed bill continues this general application, which we believe is the wisest and fairest approach. 2/

(B) Statutory Amendment Versus Executive Order

Given this broad coverage, we also believe it would be clearly preferable to extend this disability to non-civil service pension systems by statute, as contemplated by our proposed draft, rather than by Executive order. Without an amendment of 5 U.S.C. § 8312 in this regard, extension of this provision to Foreign Service and CIA personnel may simply not come about, and unequal application of the statute would follow. Moreover, absent a statutory provision establishing authority for pension denial under these other retirement systems, or at least establishing authority for the promulgation of regulations to make these other systems parallel to the federal system in all respects, it is unclear whether all of the non-civil service pension systems could be made subject to these limitations by Executive order.

(C) Administration

A third question raised by the letters concerns administration of these provisions by the civilian non-civil service retirement systems. Under the existing disqualifying provisions of § 8312, pension denials are apparently made by the administrators of each separate pension system, including the CIA. In light of this decentralization, the CIA argues that OPM's "exercise of discretion over CIARDS" -- as the current draft bill contemplates -- "would be an unprecedented intrusion into [the CIA's] wholly internally-administered retirement system." Although not discussed by the CIA, the other non-civil service retirement systems may well adopt a similar position.

In our view, there are strong reasons for placing the administration of these new penalties in only two agencies, OPM and the Department of Defense. Unlike the existing

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2/ Although the State Department's letter appears to suggest that its employees might not be subject to this penalty under the bill, based upon informal conversations this Department has had with the Legal Adviser's office we understand they now are in agreement with our construction.

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provisions in § 8312, which automatically disqualify employees from receipt of a pension upon conviction of certain crimes, the proposed amendment would invest the administering agencies with wide discretion in deciding whether to deny a pension to employees convicted of the crimes listed in regulations promulgated by the Attorney General. Thus, in contrast to the existing penalities, there is a clear need in the case of these new sections to develop administratively uniform standards for all agencies in the denial of pensions. Placing control in these two agencies furthers this goal and avoids the enforcement by each of the independent pension systems of different standards for denying pensions to employees.

Despite these advantages, we recognize the possibility that particular pension systems may have special reasons for favoring their control over the denial of annuities under these provisions. In light of the many agencies whose interests might be affected by decentralization, we suggest that the views of OPM and other agencies with separate pension systems be solicited on this question. If the CIA and these other agencies can demonstrate that such control would seriously undermine the operation of their particular programs, we would be prepared to reconsider our view that OPM and DOD should administer all of these restrictions.

(D) Military Pay

We have one final comment to make regarding the treatment of military retired pay under the latest OPM bill. Our draft provides in proposed 5 U.S.C. § 8312(e)(1) that the Department of Defense may deny military retired pay to an individual or a survivor or beneficiary if the individual is convicted either of one of the enumerated offenses in connection with his or her service as a civilian employee or of such an offense within the purview of the Uniform Code of Military Justice. However, the OPM draft bill eliminates the first category of offenses -- i.e., those which occur in connection with civilian employment -- from possible pension denial by the military. As a result, a military member can be denied military retired pay under the bill only for those offenses which occur while he or she is a military member and subject to the military justice system.

In our view, the OPM restriction on denials of military retired pay would result in an unnecessary loophole and an arbitrary distinction in the operation of the bill between federal civilian employees and former military members later serving as civilians. Thus, for example, under the OPM draft a retired 20-year military member receiving a military pension and serving as a federal civilian employee could not lose his

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or her military pension as the result of being convicted of a job-connected felony, such as bribery, committed in connection with his or her civilian employment. On the other hand, a 25-year civilian employee with no military pension would stand to lose his or her entire civilian annuity for the same offense.

Movement from the military to the civil service for purposes of 5 U.S.C. § 8312 should not result in any different pension denial rules than movement between civilian agencies. The 25-year civilian in the example above could lose his or her pension under our bill whether or not the offense was committed during the employee's tenure in the civilian agency in which the employee's pension rights were built -- even if the agency has its own retirement system. Thus, under our bill a former CIA employee eligible for a CIA pension could lose this pension as the result of a felony conviction occurring during later employment with another federal agency. Former military members should not be treated differently from other government employees. 3/

Finally, although not raised in any of the letters, we recommend our draft be amended in one respect -- to make it clear that the standard for denying a pension must be related to the maintenance of the integrity and efficiency of the government service. The Department's prior draft, which would authorize denial of a pension when required to further "the interests of justice," could be interpreted as furthering a criminal law enforcement goal, thereby subjecting the statute to challenge under the Double Jeopardy Clause, U.S. Const. amend. V. In order to insulate more fully the statute against constitutional attack, we propose that denial should be permitted only "when the efficiency and proper administration of the Government would be furthered by denial of the annuity." In addition, we believe OPM and the Department of Defense should be specifically authorized to promulgate regulations implementing this standard.

3/ Current law in 5 U.S.C. § 8312 does not impose the artificial restriction on denial of military retired pay reflected in the OPM draft. That is, it does not require that the offense have been committed during a period of military service for mandatory denial of military retired pay to apply. Likewise, an amendment of § 8312 should not impose such a restriction. It is essential that this bill apply fairly and equally throughout the government.

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A copy of the new draft bill incorporating these changes and other clarifying amendments is attached.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

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